

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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ALTRIA CLIENT SERVICES, LLC: Civil Action No.:
et al., :
: 1:20-cv-393
Plaintiffs, :
versus : Friday, June 3, 2022
: RAI STRATEGIC HOLDINGS, :
7 INC., et al., :
: Defendants. :
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The above-entitled status conference was heard
before the Honorable Leonie M. Brinkema, United States
District Judge. This proceeding commenced at 11:02 a.m.

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action 20-393, Altria Client Services, LLC, et al. versus RAI Strategic Holdings, Inc., et al.

Would counsel please note their appearances for the record.

MR. GRANT: Good morning, Your Honor. Max Grant, Elizabeth Weiswasser, and Clem Naples on behalf of the plaintiffs this morning.

THE COURT: Good morning.

MR. MOLSTER: Good morning, Your Honor. Charles Molster on behalf of the Reynolds entities. With me at counsel table is Stephanie Parker from the Atlanta office of Jones Day; David Maiorana who is from the Cleveland office of Jones Day; and Gillian Schroff who is also from the Atlanta office of Jones Day.

THE COURT: Very good. Good morning.

MR. MOLSTER: Thank you.

THE COURT: It's my first time meeting most of you. As you know at this point, because Judge O'Grady has become ill, I've been asked to take over this case, and I think it's best that we do today on the record. We did have a phone conference yesterday that was on the record.

Mr. Molster, your connection was really poor, and so that --

1 MR. MOLSTER: I apologize for that, Your Honor.

2 THE COURT: No, that's not your fault. I'm just
3 saying the transcript is not very clear. I want to make
4 sure -- because this obviously is a significant case, and I
5 want to make sure that the record is fully established.

6 So what we discussed yesterday was, among other
7 things, the fact that I would be taking this trial, but I
8 was sensitive to the fact that it might be -- that you
9 all -- and you had to agree to this, that if all the parties
10 involved were concerned about having a different judge try
11 the case, that I would then let you know that Judge O'Grady
12 would not be available to try this case until August 15.

13 My understanding from email communications is that
14 the -- Mr. Grant, you and your client do not want the trial
15 date changed, you want to get it done.

16 MR. GRANT: That's correct.

17 THE COURT: All right. And I understand,
18 Mr. Molster, that your client is objecting.

19 Now, there has not been an agreement to go to the
20 August time, and I also understand that, you know,
21 Judge O'Grady did address earlier requests, Mr. Molster, by
22 your client, to have the trial put off later. He denied
23 that. And, as I've said, I'm not going to upset any of his
24 rulings. And so the law of the case, in my view, is it's
25 going to go forward next week over your objection; all

1 right?

2 MR. MOLSTER: Understood, Your Honor.

3 THE COURT: All right. And I assure you that I
4 will be spending the weekend learning more than I probably
5 want to know about e-cigarettes and the patents that are
6 involved. I've already done some work on this case already.
7 So I will try to be as conversant with the issues as Judge
8 O'Grady would have been.

9 And I was telling my law clerk, and certainly,
10 Mr. Molster, you'll remember the old days when the Court ran
11 on a master calendar, and it was not uncommon to have one
12 judge who might have done a motion to dismiss, a different
13 judge do the motion for summary judgment, and yet a
14 different judge try the case. So this is like going back to
15 the old days.

16 MR. MOLSTER: I remember it well, Your Honor.

17 THE COURT: All right. And we managed to
18 function.

19 So this case will go to trial next week. We
20 cannot start until Wednesday. We're going to start
21 Wednesday at 10:00 with jury selection.

22 Before that time, I will review the FJC Tutorial,
23 which has been submitted to me for consideration. I will
24 also take a careful look at the proposed voir dire,
25 particularly any that you want the Court to ask. And then I

1 will -- as I said to you yesterday, I will conduct the voir
2 dire, but you will have an opportunity if you object to put
3 those objections on the record.

4 We are going to have to proceed with safety
5 precautions. I'm pleased you're all wearing masks. The
6 official order hasn't gone out yet, but there will be a new
7 posting at the front of the courthouse.

8 That does remind me. You've indicated, Mr. Grant,
9 that many of your witnesses are international; maybe some of
10 the defense are as well. There is a protocol that the Court
11 requires for testing. I hope all of your international
12 witnesses are already in the States, but, if not, you need
13 to be making sure that they are monitoring their health
14 situation, all right, so we don't have a problem in that
15 respect.

16 MR. GRANT: That's correct, Your Honor. They've
17 also been here for somewhere between five and seven days,
18 and we have tested them, so we have a relatively high level
19 of confidence at this stage.

20 THE COURT: Good. And, Mr. Molster, how about for
21 your -- do you have any foreign travelers?

22 MR. MOLSTER: We have one witness who's
23 international, Your Honor, and who I believe is coming in
24 tomorrow -- Sunday -- this weekend.

25 THE COURT: Make sure that that person -- I mean,

1 I know the airlines still have a protocol, but still, as you
2 know, you can get the virus, and it can take a couple of
3 days to develop. Because what I don't want to do is have to
4 delay the trial because we have a problem within the
5 courtroom itself.

6 We are going to put some plexiglass back. There
7 will be plexiglass around the witness box. There will be
8 one or two pieces in front of my court reporter. I'm not
9 going to put plexiglass back at the lectern. Now -- and
10 when you're at the lectern, I will allow counsel to take
11 their mask off. Obviously if any of you start feeling ill,
12 you're not to come to the courthouse, and you're to let our
13 chambers know promptly. But it's too difficult to hear
14 testimony or conversations with counsel.

15 So any time any lawyer is talking, you've got to
16 be at the lectern, and you may then have your mask off. For
17 that reason, we are not going to have you sitting right next
18 to the lectern.

19 So, Mr. Molster, for the trial itself, you'll have
20 to be in the middle seat or depending upon how you all are
21 working yourselves.

22 MR. MOLSTER: Understood, Your Honor.

23 THE COURT: I don't have a problem with three
24 attorneys at the second table. So the maximum number of
25 attorneys in the well, five per side. It's better not to

1 have that many, but that's up to you all. And I understand
2 different lawyers are taking different witnesses. So the
3 lawyers who are sitting in the spectator area, when it's
4 your time to handle a witness, you just, you know, change
5 positions.

6 MR. GRANT: I presume it's acceptable if one of
7 those five slots are taken by a corporate representative?

8 THE COURT: Of course.

9 MR. GRANT: Thank you.

10 MR. MOLSTER: Your Honor, with respect to --

11 THE COURT: Yeah. Why don't we get used to being
12 at the lectern.

13 MR. MOLSTER: Sorry, Your Honor.

14 With respect to the seating, I'm wondering if it
15 would be possible if we could have a couple of chairs maybe
16 inside the well but away from the tables for lawyers.

17 THE COURT: Why can't they sit in the well -- I
18 mean in the spectator area?

19 MR. MOLSTER: If that's what the Court would
20 prefer, that's fine.

21 THE COURT: Yeah. It's not -- we have, as you can
22 see, different levels of this floor because of the
23 technology that runs underneath it.

24 MR. MOLSTER: Right.

25 THE COURT: There's no safe place to put chairs

1 over there. All right. So I don't see any reason why --
2 you know, we can -- I don't expect that many members of the
3 public to come to this trial.

4 MR. MOLSTER: Right.

5 THE COURT: If it's just full of lawyers --

6 MR. MOLSTER: It's pretty exciting stuff, Judge,
7 you know. Don't undersell us.

8 THE COURT: Yeah, I now.

9 But in terms of -- you know, if you want your
10 lawyers to be in the first two rows or something like that,
11 that's not a problem.

12 MR. MOLSTER: That would be great.

13 THE COURT: We're not imposing any distancing --
14 any formal distancing requirements. I am going to have the
15 jurors -- we're going to sit eight jurors, sit every other
16 seat to give them a sense of -- a little bit of a sense of
17 spacing.

18 But in terms of, you know, the spectators, all
19 your lawyers can sit elbow to elbow if that's how they want
20 to sit.

21 MR. MOLSTER: One other question. We did last
22 time jury selection upstairs. Are we going to do jury
23 selection in here?

24 THE COURT: We're going to do jury selection in
25 here. You should have gotten the jury list yesterday.

1 MR. MOLSTER: We got it. Thank you very much.

2 THE COURT: Okay. Good. That jury, as you know,
3 has been screened for vaccination.

4 MR. MOLSTER: Understood.

5 THE COURT: I know that was over your objection,
6 but that is absolutely how we've been proceeding.

7 MR. MOLSTER: Understood.

8 THE COURT: And I will start the voir dire with
9 asking the jurors if anyone in their household has been sick
10 or if any of them are feeling under the weather. And I'm
11 telling you right now, if any juror says yes, I'm excusing
12 them on the spot so that we don't have the problem, which
13 Judge Trenga had with his trial, where a juror came to court
14 not feeling well, and the next day it was reported she's
15 positive. And that whole jury has now been exposed, and
16 they've had to continue the case five days.

17 So I don't want that to happen here. All right.
18 So I'm going to do that, and I assume there's no objection.
19 Any juror who says they're not feeling well or their family
20 member has been sick, we're going to just excuse them.

21 MR. GRANT: No objection from plaintiffs.

22 MR. MOLSTER: No objection, Your Honor.

23 THE COURT: All right. That's fine. Okay. All
24 right. Let me just see. I had a bunch of things.

25 All right. Now, in terms of the exhibits. I'm

1 told there are, what, 64 boxes. I think one of you said
2 there were 64 boxes of exhibits.

3 MR. MOLSTER: I think it's 23 -- if we're only
4 talking about one set -- excuse me, Your Honor.

5 THE COURT: That's where the microphone is.

6 MR. MOLSTER: I think it's 23 -- I should know
7 better, Judge.

8 23 for our side, I believe, and 16, I believe, for
9 their side. I'm not 100 percent sure about their side.

10 THE COURT: But a lot of boxes.

11 MR. MOLSTER: A lot of boxes.

12 THE COURT: All right. How big are the notebooks
13 within the boxes?

14 MR. MOLSTER: So we're trying to make them
15 manageable --

16 THE COURT: All right.

17 MR. MOLSTER: -- so that they're not falling
18 apart.

19 THE COURT: But, I mean, are they the large ones?

20 MR. GRANT: 4 inches, Your Honor, for us.

21 THE COURT: All right. I don't want them any
22 bigger than that because they become unmanageable.

23 Now, the other thing is -- and I don't know how
24 you've organized your exhibits, but since the case doesn't
25 start until Wednesday, perhaps they can be redone.

1 Have you tried to make the exhibits connected to
2 the particular witness who's testifying? In other words,
3 are we going to have to be shifting book to book to book
4 when you're talking to a witness, or are most of the
5 exhibits needed for Witness Number 1 going to be in one or
6 two specific binders?

7 MR. MOLSTER: We will have a witness binder
8 specific to that witness with extra copies of the exhibits
9 so the witness -- so we don't have to borrow -- we don't
10 have to bother the court security officer or fish around for
11 exhibits out of the boxes.

12 So each witness will have a witness binder. We'll
13 have one for the Court, one for -- Scott Wallace had
14 requested he have a copy, which is fine, one for Yolanda,
15 obviously, and one -- if she wants one, and one for your law
16 clerk.

17 THE COURT: That will be fine.

18 MR. MOLSTER: Obviously one for the other side.

19 THE COURT: All right. That will be good. And
20 then what I'll want is -- and this is a courtesy for the
21 other side as well -- the night before each day of trial, I
22 would like a list of the witnesses and in the order you plan
23 to call them.

24 MR. GRANT: Your Honor, we have a very detailed
25 protocol that we've worked out. I think it's actually

1 two days before --

2 MR. MOLSTER: Three.

3 MR. GRANT: No, two days before that they be
4 announced in the order we're disclosing direct exhibits so
5 if there's objections, we can try to work them out --

6 THE COURT: Excellent.

7 MR. GRANT: -- and then bring them to the Court
8 before the jury.

9 THE COURT: Excellent.

10 MR. GRANT: This is all subject to a relatively
11 detailed stipulation. I believe that's been filed.

12 MR. MOLSTER: Yes. It's a written stipulation
13 that's on file with the Court.

14 THE COURT: All right. I will make sure we've
15 pulled that so I'm on top of it as well. But that's
16 excellent. Good.

17 MR. MOLSTER: Your Honor, one thing on exhibits.

18 Judge O'Grady offered that if we wanted to, with
19 certain particular witnesses, we could have binders of, I
20 think he said two or three or four exhibits that we could
21 publish to the jury in a binder for each juror in addition
22 to something on the screen because some people like to look
23 at the hard copy. He didn't want us to -- you know, not
24 every witness and not a million documents. I don't know if
25 that's something that is agreeable to Your Honor or not, but

1 I just thought I'd raise it.

2 MR. GRANT: Your Honor, that's not how I recall
3 Judge O'Grady's offer. My recollection --

4 MR. MOLSTER: There's a transcript.

5 THE COURT: Wait. Let's switch positions. Again,
6 I want to train you to be at the microphone, please.

7 MR. GRANT: It was tough to get him out of here.

8 The -- my recollection was Judge O'Grady was less
9 happy about the witness binders and suggested that a witness
10 binder would be fine as long as it only had a couple of
11 exhibits. He, I don't think the record will reflect in any
12 way, indicated that those should go to the jury. Of course
13 the jury will have the record evidence when they deliberate.

14 Given your Court's -- this Court's view on witness
15 binders, then I think it's quite easy. But I don't think
16 there was any indication that the jurors should get binders
17 during the course of the trial.

18 THE COURT: Well, let me put it this way: It's a
19 patent case. When I've tried other patent cases, we have,
20 in fact, given each juror the patents.

21 MR. GRANT: For sure.

22 THE COURT: All right. Which they should have as
23 the evidence is coming in. That -- so that would be a juror
24 notebook or package.

25 MR. GRANT: Agreed. And we can make juror

1 notebooks with specific exhibits that either the Court rules
2 or the parties agree should be in there. But I agree
3 100 percent that the patents should be the first ones in
4 there.

5 THE COURT: Why don't you, over the weekend,
6 because we've got time, see if you can come to an agreement
7 as to what an appropriate juror packet would be. And what I
8 would tell the jury, though, I don't want them rummaging
9 through it. And I'll tell you, jurors, at least in my
10 experience here, have been very, very good in following our
11 instructions.

12 For instance, we, often for transcripts, if we're
13 having a lot of wire tap evidence in the case, we would give
14 them the transcripts in a book but tell them don't turn to
15 the next page until you're directed to do so.

16 So I think if you can come to an agreement. And I
17 have no problem with jurors having a set of key exhibits in
18 their possession as the trial progresses.

19 MR. GRANT: We will do so.

20 THE COURT: All right.

21 MR. MOLSTER: Excuse me. Yes, Your Honor. Thank
22 you.

23 THE COURT: That's fine. All right.

24 Okay. So the next thing we're going to have to
25 address is the technology.

1 Now, I'm assuming that many of the exhibits as
2 they're being discussed -- you're also going to be putting
3 them on the screen; correct?

4 MR. MOLSTER: That's right, Your Honor.

5 THE COURT: All right.

6 MR. MOLSTER: And what we had arranged with
7 Judge O'Grady and Conklin Howard, his law clerk, was that we
8 would have one full set of exhibits in hard copy, which we
9 would deliver to the courtroom, but we would also have hard
10 drives of -- I'm sorry, thumb drives of --

11 THE COURT: Of exhibits.

12 MR. MOLSTER: -- exhibits electronically.

13 THE COURT: Right. Right.

14 MR. MOLSTER: And so we were going to give a
15 copy -- I think Conklin wanted a copy, and we're happy to
16 obviously provide one to Mr. Loftus.

17 THE COURT: And there's nothing unique about that.

18 Documents, however, do not look -- are usually not
19 very clear on the screen unless you've done a really good
20 job with your technology in blowing up the relevant portions
21 and you have them highlighted. And I would expect that both
22 sides are sufficiently sophisticated that you've done
23 something like that.

24 But I will tell you, I have heard from jurors in
25 the past. They get very frustrated if an exhibit is a

1 document -- and I think a great deal of this case will be
2 documents -- and they're struggling to see it on the screen.
3 That's a waste of their effort. So I'm assuming that your
4 technology people have worked that out.

5 MR. GRANT: We have, Your Honor.

6 THE COURT: All right.

7 MR. GRANT: And based on what I've seen in
8 hearings, I'm confident that Reynolds will as well. And,
9 indeed, our technology person that will be displaying the
10 documents, the hot seat for the trial, is here. So we're
11 happy to jointly coordinate with the Court and the Court's
12 technical staff as is convenient.

13 THE COURT: Well, behind you is the evidence
14 presentation system that's used in this court. All right.
15 So that's where your tech people will be working. And
16 normally we would have -- there's a chair right next to the
17 table. So we don't need a table, we don't need a skirt, we
18 don't need a lot of the things that I've seen on your list,
19 because we're going to go over the request for electronics
20 in a minute; all right?

21 MR. GRANT: Understood.

22 THE COURT: All right. But to the extent that you
23 haven't worked on this system -- and I recommend it be tried
24 in this courtroom, because each courtroom is a little bit
25 different. That's the system that's going to be used. We

1 also, like Judge O'Grady's courtroom, have screens out there
2 in the spectator area. So any exhibit that is put up can be
3 seen by the public as well as the jury and the Court and the
4 witness.

5 What we don't have -- and I don't know whether
6 much of this will be necessary. We don't have the
7 technology to capture any marking that a witness does on the
8 screen. So the -- a witness can highlight on the screen by
9 putting his finger on it, but, unfortunately, we don't have
10 the ability to capture that. So if anything like that is
11 part of your case, I recommend, if possible, that you have
12 the witness do the highlighting before he comes to court so
13 you have a hard copy of that, or you're going to need to
14 describe it appropriately for the appellate record; all
15 right?

16 MR. MOLSTER: May we use an easel and flip chart
17 if --

18 THE COURT: If necessary. I don't think -- given
19 the distance between where the jury sits, I've not seen
20 easels or flip charts used well in this courtroom, but if
21 you think your person can do it. The problem is, the
22 witness has to be speaking where we have the microphone.

23 MR. MOLSTER: Right.

24 THE COURT: And so it's difficult, frankly, for
25 them to stand up with a pointer. So it's better not to do

1 it that way; all right?

2 MR. MOLSTER: Understood.

3 THE COURT: Okay.

4 MR. MOLSTER: Do you ever put a screen down here,
5 a big screen at the end of the jury box for the jury?

6 THE COURT: There's one right here. This wooden
7 thingy here has a screen that comes up.

8 MR. MOLSTER: Oh, great. Okay.

9 THE COURT: So there's a large screen there, and
10 then we have individual boxes.

11 MR. MOLSTER: And the floor monitors.

12 THE COURT: Yeah.

13 MR. MOLSTER: Okay.

14 THE COURT: And I tell the jurors they can move in
15 the box if they're having trouble seeing.

16 MR. MOLSTER: Great. Thank you.

17 THE COURT: Okay. Now, in terms of the
18 technology, as I told you all yesterday, I don't allow cell
19 phones in my courtroom. There will be no cell phones.

20 There will be no hotspots in the courtroom. I'm giving each
21 side one laptop. You should be able to have all your data
22 sufficiently on a laptop.

23 The court reporter who I'm going to use is Scott
24 because he's worked with you before. I understand you've
25 requested daily and also realtime. I am permitting him to

1 do realtime. He's going to give each side, I think it's
2 two, it might be more than that, but at least two iPads from
3 which you can retrieve the information. It's an intranet
4 connection; it's not an internet connection.

5 He is going to want those Pads back at the end of
6 each day of the trial because he has to recharge them, and
7 then you'll get them the next morning. All right. But
8 that's how we're going to proceed in that respect.

9 So I think both sides need to redo their requests
10 for authorization because you asked for way too much there.

11 MR. MOLSTER: Thank you. We understand.

12 One of the questions -- well, one of the requests
13 was a printer to put in the witness rooms.

14 THE COURT: I'm sorry?

15 MR. MOLSTER: A printer to put in the witness
16 rooms. Not in the courtroom, but just in the witness rooms.

17 THE COURT: No.

18 MR. MOLSTER: And we also had a request for a
19 monitor. We also have our technical --

20 THE COURT: You have monitors --

21 MR. MOLSTER: Matt Barns -- Mark Burns.

22 THE COURT: You have monitors at your table. All
23 right. We'll just set those up.

24 MR. MOLSTER: Very well, Your Honor.

25 THE COURT: All right. So you'll resubmit. So

1 I'm not going to sign the ones because I'd have to cross out
2 too much stuff.

3 MR. GRANT: Understood.

4 THE COURT: All right.

5 MR. MOLSTER: Understood. Thank you, Your Honor.

6 THE COURT: All right. Other than that, I want to
7 make crystal clear, Mr. Grant, so when I leave, I'll ask
8 Ms. Guyton, my courtroom deputy, to show you the board so
9 there's no question about backstriking since we had that
10 discussion, or are you 100 percent comfortable with it?

11 MR. GRANT: Yeah, no. I just want to understand
12 the Court's procedure. We just picked a jury, and what the
13 judge did there was put -- to select eight with three
14 peremptories, put 14 in the box and then you select it. But
15 I understand the Court's process, which is one I'm also
16 familiar with, which is pulling up random jurors rather than
17 us knowing the set from which we're working.

18 I understand. Of course I've got no problem.
19 It's your court, and we'll do it your way, for sure.

20 THE COURT: All right. That's fine. That's fine.
21 Yes.

22 MR. MOLSTER: Ms. Parker had a couple of questions
23 about opening statements. If you wouldn't mind allowing her
24 to address the Court.

25 THE COURT: Okay.

1 MR. MOLSTER: Thank you, Your Honor.

2 MS. PARKER: Good morning, Your Honor.

3 THE COURT: I like them short. I've never seen an
4 effective opening statement that went more than about
5 20 minutes.

6 MS. PARKER: So that was one of my questions, Your
7 Honor. When we had the discussion with Judge O'Grady about
8 openings, he said that would come out of our time. You
9 know, it's going to be a timed trial with the clerk and the
10 parties keeping up with the time. And we could use whatever
11 we wanted, but he thought somewhere between 30 and
12 45 minutes would be appropriate.

13 Is that consistent with Your Honor's --

14 THE COURT: I just said 20.

15 MS. PARKER: -- request? Pardon?

16 THE COURT: I just said 20.

17 MS. PARKER: 20. Okay.

18 THE COURT: Yep. All right.

19 MS. PARKER: In terms of the timing, keeping up
20 with the timing, how would Your Honor like us to proceed in
21 terms of coordinating that with the Court?

22 THE COURT: Okay. I've not done that before, so
23 I'm intrigued. I've thought about doing it. I've never
24 done it because it seems to me that I would rather just give
25 each side a time frame, and the next day, the plaintiff

1 rests. But I realize the problem with that is that means
2 cross-examination can throw that off. So I think, given the
3 nature of this case and because we are on a tight time
4 schedule -- and you may have to reevaluate your schedule
5 because I've given you the -- Friday the 17th we've got to
6 be done. And that means all the evidence is in and I've
7 instructed the jury. And I suspect it's going to take two
8 or three hours to instruct the jury, although I'm going to
9 try to pare down some of those jury instructions. So that's
10 what you have to be thinking about. All right. That's why
11 shortening is important. All right.

12 Again, repeating what I said yesterday, I
13 understand that there are, what, ten claims over five
14 patents or something like that. It would be very wise to
15 think about whether you really need all five of those
16 patents, whether you really need all of those claims, even
17 at this point. It's not uncommon that a case really focuses
18 on two or three core issues. And given the fact that life
19 is short, everything in life is finite, so are trials,
20 certainly in this court. It's smart to focus on the
21 essentials. All right.

22 And so 20 minutes per side for the opening
23 statements.

24 MS. PARKER: Thank you, Your Honor.

25 In Your Honor's courtroom, do the jurors take

1 notes?

2 THE COURT: Yes. I let them take notes.

3 MS. PARKER: Okay. From beginning with opening or
4 beginning with the presentation of evidence?

5 THE COURT: When I give them my preliminary
6 instructions, I give them an instruction about note-taking.
7 And they get the notes -- they're going to get a little
8 goody bag with hand sanitizer and bottles of water, et
9 cetera. And I give them -- we give them a notebook, and
10 they can take notes, yes.

11 MS. PARKER: All right. And this is my last
12 question.

13 THE COURT: That's all right.

14 MS. PARKER: So we had submitted, and I think
15 everybody's agreed on the preliminary instructions that
16 Judge O'Grady was going to use.

17 THE COURT: Uh-huh.

18 MS. PARKER: Will Your Honor use those same ones,
19 or should we check in with the Court later to find out --
20 what should we expect in terms of the preliminary
21 instructions to the jury?

22 THE COURT: Well, that's one of the things I'm
23 still going over. I mean, I give them the basic structure
24 of any civil case. I give them basically -- but it's a
25 patent case. So, again, one of the things I'm debating

1 about is whether I'm going to use the FJC Tutorial.

2 How long does that run?

3 MR. MOLSTER: I think it's about -- excuse me,
4 Your Honor. I think it's about 17 minutes.

5 THE COURT: 17?

6 MR. MOLSTER: I think so.

7 THE COURT: Yeah. I may use it; I may not. And
8 I'm certainly not going to duplicate what's there. So they
9 only are going to be told what is a patent one time.

10 So I can't tell you exactly at this point what I'm
11 going to be doing. I will look through the proposed
12 instructions, and I will get back to you, probably by close
13 of business Monday, which ones I'm going to give; or I may
14 say I'm going to give a version of so you have some idea as
15 to what I'm going to do. Because obviously for opening
16 statements, you may not need to go into that if I've already
17 given it to the jury.

18 MS. PARKER: Does the podium move during opening?
19 How do we --

20 THE COURT: Only slightly. It will move so that
21 you're somewhat angled in their direction, but it's not a
22 super movable -- and our staff does that; you don't touch
23 it.

24 MS. PARKER: Okay. Thank you, Your Honor.

25 THE COURT: Okay. All right.

1 MR. GRANT: Just very briefly, Your Honor. In
2 terms of the time limits, that's the way it's done in most
3 patent cases. The paralegals keep time. In the last dozen
4 trials I've done, there's never been a dispute that rose to
5 the level of having to bring it to the Court about
6 reconciling time estimates.

7 THE COURT: I have no problem with you all just
8 working them out once you've revised them, I guess.

9 MR. GRANT: We'll do that.

10 THE COURT: And I'd like to know -- just let me
11 know what your schedule is.

12 MR. GRANT: For sure.

13 THE COURT: All right.

14 MR. GRANT: And we're happy to provide those time
15 hacks to the clerk so everybody knows how it's going.

16 Just in terms of how the Court understands, there
17 are five patents, but there's also four products. Those
18 patents cover different -- not all of them are co-extensive,
19 and each patent has a different damages analysis associated
20 with it.

21 So I just want the Court to understand that what
22 you'll see in opening is they cover different distinct
23 technologies; they're not related in the sense of covering
24 the same technologies; and the damages numbers for each one
25 is different.

1 THE COURT: I assume you're bringing physicals
2 into this courtroom?

3 MR. GRANT: We will.

4 THE COURT: All right. Yeah. That's important
5 for this type of a patent.

6 MR. GRANT: Agreed.

7 THE COURT: Yeah. I'm so glad there are no
8 algorithms. I have to tell you, I wasn't going to take the
9 case until I heard it was physicals. I thought, ah, that's
10 easy. It's a pleasure to have something, you know, that I
11 can understand.

12 MR. GRANT: It's an aggressive prediction, Your
13 Honor, but I think you're going to enjoy this trial.

14 THE COURT: All right. We'll see. We'll see.

15 I haven't looked at your proposed voir dire, but I
16 assume you do have questions about people's attitudes
17 towards e-cigarettes and that sort of thing.

18 MR. GRANT: We do, Your Honor. And, you know, one
19 of the things that came up with Judge O'Grady was tobacco
20 companies. But obviously everybody who is a party here is a
21 big tobacco company.

22 THE COURT: That's right.

23 MR. GRANT: So I don't see that as being a big
24 issue.

25 THE COURT: Right. Okay. Okay. All right.

1 Yes.

2 MR. MOLSTER: Your Honor, you know, to that point,
3 we're the only ones that are defendants here. As to the
4 issue of two tobacco companies, we're the only ones whose ox
5 can get gored by this jury.

6 Secondly, I want to raise the issue of
7 confidential business information. We raised it with Judge
8 O'Grady. We've got some source code issues and other
9 confidential business information.

10 I think our plan was to try to -- we could put
11 those exhibits under seal and try to talk about them
12 generically. He was not willing to seal the courtroom in
13 terms of testimony. I don't know if that's the law of the
14 case also in your --

15 THE COURT: I would never seal a courtroom for --
16 no, that's not going to happen. Do the best you can. I
17 mean, I don't have -- I'm assuming the plaintiff -- are you
18 objecting to any of that?

19 MR. GRANT: Your Honor --

20 THE COURT: You don't know yet?

21 MR. GRANT: I'm confident we'll work it out. This
22 doesn't worry me at all.

23 THE COURT: Okay. That's fine.

24 In terms -- just so I have a sense, how many
25 experts are being called in this case? You've got -- both

1 on liability and damages or just on damages?

2 MR. GRANT: Liability because a patent case with
3 distinct technologies.

4 THE COURT: All right.

5 MR. GRANT: There's also damages and FDA. So
6 there's five on our side.

7 THE COURT: Five for the plaintiff?

8 MR. GRANT: Yes.

9 THE COURT: All right. Mr. Molster, how many
10 experts do you think you've got?

11 MR. GRANT: Five technical experts and one damages
12 expert.

13 THE COURT: All right. And they don't overlap,
14 each expert has their own clear area of expertise?

15 MR. GRANT: That's my understanding, Your Honor.

16 THE COURT: All right. It is my practice -- and
17 you may have stipulated to the curriculum vitae.

18 Is there any fight about the experts in terms of
19 their qualifications?

20 MR. GRANT: Your Honor, based on what I saw in a
21 related ITC trial, I don't think there's going to be any
22 objection to tendering and qualifying any of the experts.

23 THE COURT: All right. That's something that can
24 move the case along. All right. And I normally, with
25 experts unless there's some real genuine dispute, accept

1 people once you've proffered them. I'm going to call Dr. So
2 and So as an expert in the area of such and such, and his
3 curriculum vitae is Exhibit 32. That's it. I don't have
4 them go through where they went to high school and college
5 and all that kind of stuff. All right. That shortens the
6 trial. And I don't know if you had already planned that in
7 your questioning of the witnesses, but, you know, that
8 doesn't limit foundation to the -- you know, their
9 foundations as to how they came to their conclusions or
10 anything like that. But I want to avoid wasting the jury's
11 time on those peripheral matters; all right?

12 MR. MOLSTER: Understood, Your Honor. Thank you.

13 THE COURT: So is there anything else? You've
14 seen the courtroom. I know it's smaller than Judge
15 O'Grady's. I'm assuming that -- having looked at it, we
16 will give each one of you a witness room where you can store
17 things. And what we do is we lock up the courtroom -- those
18 rooms overnight so that you can leave your things there.

19 I'm going to try to start the trial at 9:00 after
20 the first day. As I said, next week, we start Wednesday at
21 10:00 with the jury. We'll go to 6. Thursday, hopefully we
22 can get started at 9, go to 6. Friday we will start at 9
23 and go until noon. We will not be able to go beyond that
24 because of an investiture that's scheduled for the
25 afternoon. And then the following week it will be 9 to 6 as

1 best we can do. All right.

2 I may have a couple of criminal matters I have to
3 take during the week. I'm going to take them before 9:00.
4 That may require some cleaning of your desks, but because
5 right now this is the only trial I have scheduled, I'm
6 hoping I can let you leave your things in the courtroom
7 except for, you know, laptops and equipment that you might
8 want to actually have locked up. All right.

9 So are there any other logistical issues that we
10 need to discuss? So I've overruled the objection to the
11 case being continued. It's going to go forward,
12 Mr. Molster, as scheduled starting on Wednesday.

13 MR. MOLSTER: Understood, Your Honor. Thank you.
14 I don't think we have anything else. Thank you very much
15 for meeting with us this morning.

16 THE COURT: All right.

17 MR. MOLSTER: We're going to -- just to be clear,
18 we'll arrange a tech run-through with Lance maybe Monday.

19 THE COURT: Right. And so make sure that you've
20 gotten the revised technology --

21 MR. MOLSTER: Request.

22 THE COURT: -- authorizations because you can't
23 bring anything into the courthouse until you've got that.

24 MR. MOLSTER: Understood.

25 THE COURT: And we'll go ahead and enter that.

1 MR. MOLSTER: Thank you.

2 MR. GRANT: Your Honor, I understand we may have
3 some oversized exhibits. Is it possible that we work
4 directly with your courtroom deputy just to talk logistics?

5 THE COURT: Talk to Ms. Guyton. When I leave, you
6 can talk to her about that.

7 MR. GRANT: Thank you very much.

8 THE COURT: All right. And there's some
9 logistical things we've talked about in terms of how things
10 will be delivered to the courtroom. So you need to stay in
11 court and talk to my staff about that.

12 MR. GRANT: Of course.

13 THE COURT: All right. If there are any
14 last-minute issues that could delay things on Wednesday, you
15 need to file -- if there's, you know, some last-minute
16 glitches that come up, I don't want to take up the jury's
17 time on Wednesday.

18 Actually, we could do it -- I don't have anything
19 scheduled. We could do them at 9:00 Wednesday morning. All
20 right. The point is, I don't want to have to delay the
21 trial because there's some new motion in limine or whatever.
22 I am going to talk to Judge O'Grady or have his staff
23 communicate with him.

24 He's got a draft order that memorializes the
25 rulings he made at your last hearing. We talked a little

1 bit about them yesterday. I'm going to make sure that he's
2 comfortable with the draft order. I've looked at it, I've
3 suggested one change to it. And if he authorizes me to, I'm
4 going to sign it so that you have it just for the record so
5 you just don't have the transcript. All right.

6 So is there anything else that we need to address
7 right now?

8 MR. GRANT: Just one thing, Your Honor. Since
9 you're communicating with Judge O'Grady and his staff, I
10 would ask that on behalf of both parties you send our best
11 wishes for a speedy recovery.

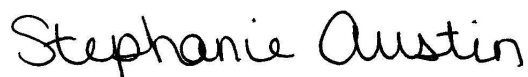
12 THE COURT: Thank you. Thank you.

13 MR. MOLSTER: Ditto, Your Honor. Thank you very
14 much.

15 THE COURT: All right. Very good. I'll recess
16 court. You all stay and work with my staff so the logistics
17 are finished.

18 (Proceedings adjourned at 11:35 a.m.)

19 -----
20 I certify that the foregoing is a true and accurate
21 transcription of my stenographic notes.

22 
23 _____

24 Stephanie M. Austin, RPR, CRR
25